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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 457

GUS KOTTEAKOS AND MICHAEL LEKACOS, PETITIONER

v.

UNITED STATES OF AMERICA

No. 458

NATHAN REGENBOGEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the circuit court of appeals (R. 1294–1300) is reported at 151 F. 2d 170.

JURISDICTION

The judgments of the circuit court of appeals were entered August 7, 1945 (R. 1300–1301), and

petitions for rehearing were denied August 28, 1945 (R. 1302–1303). The petition for writs of certiorari was filed September 26, 1945, and was granted November 13, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

STATUTES INVOLVED

The pertinent statutory provisions will be found in the Appendix (*infra*, pp. 42–44).

QUESTION PRESENTED

Whether there was a fatal variance between the indictment, which charged one conspiracy to violate the National Housing Act by making fraudulent applications for insured loans, and the proof, which establishes several conspiracies among different groups of defendants who operated through the same central figure in making the applications.

STATEMENT

Petitioners and others were indicted in the United States District Court for the Eastern District of New York under Section 37 of the Criminal Code (18 U. S. C. 88) for conspiring to violate the provisions of Title I of the National Housing Act pertaining to housing renovation and modernization (12 U. S. C. 1702, 1703, 1715,

and 1731)[1], by inducing lending institutions to make loans which would be offered to the Federal Housing Administration for insurance on the basis of false and fraudulent applications (R. 2–16). The indictment alleged that it was part of the conspiracy that defendants would solicit persons desiring to make loans and would represent that loans obtained under Title I could be used for payment of debts and other purposes not contemplated by the statute; that they would obtain from the borrowers false credit statements which would be submitted to the lending institutions and would present certificates falsely certifying that materials and services had been delivered and completed; that they would falsely represent the credit rating and financial worth of themselves and of other persons seeking to obtain loans and would cause lending institutions to make loans on the basis thereof which would be insured by the Federal Housing Administration; that they would use the proceeds of such loans for purposes other than housing renovation and modernization (R. 6–7).[2]

Thirty-two defendants were named in the indictment (R. 2–3). Four others were asserted to be conspirators, but were not named as de-

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[1] Pertinent provisions of this Act are copied in the Appendix, *infra*, pp. 42–44.

[2] Thirty-five overt acts were charged (R. 8–16). Those pertaining to the conspiracies in which petitioners were implicated are recited at p. 26, *infra*.

fendants.[3] Before trial a severance was granted on the Government's motion as to four of the defendants.[4] Either before trial or the hearing of testimony, the indictment was nol-prossed as to one,[5] and eight pleaded guilty.[6] Nineteen defendants were brought to trial. One pleaded guilty during the trial,[7] and a nolle prosequi was entered as to a second.[8] The case was severed as to another who became ill during the trial,[9] and verdicts of acquittal were directed as to three others.[10] Of the thirteen whose cases were submitted to the jury, two were acquitted.[11] The jury disagreed as to four,[12] and the remaining seven, including petitioners, were convicted.[13] Petitioners were each sentenced to imprisonment for one

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[3] Alexander Dreizer, Theodore Lekacos, Max Slovis, and Moses Steckler (R. 3–4).

[4] John J. D'Ambrosia, Joseph Harris, and Louis Levine, fugitives, and Jennie Weissman (R. 19, 33, 37).

[5] Samuel Weiner (R. 19, 46).

[6] Simon Brown, David Berman, Harry Dvorkin, Hyman Dvorkin, Anastasios Gerakeris, David Lapin, Morris Weiner, and Burnet Mozson (R. 18–19, 33, 35, 37, 45).

[7] Joseph Barkan (R. 19, 224).

[8] Rose Barkan (R. 20, 224–225).

[9] James Secular (R. 20, 508–509).

[10] Arthur Cook, Dorothy Slovis, and Ann Smith (R. 21, 1043, 1044, 1045).

[11] Louis Siegel and Sadie Vendicos (R. 22, 1285–1286).

[12] Max J. Posner, Mae Seklir, Pearl Seklir, and Benjamin Wolf (R. 22, 1285–1286).

[13] Petitioners Gus Kotteakos, Michael Lekacos, and Nathan Regenbogen, and codefendants Emanuel Harris and George, Herman, and Jacob Litvin (R. 22, 1285–1286).

year and three months (R. 24). Petitioners alone appealed to the Circuit Court of Appeals for the Second Circuit, which affirmed their convictions (R. 1300–1301). That court held that while the case was erroneously tried and submitted to the jury on the theory that, as alleged in the indictment, there was but a single conspiracy, whereas the proof disclosed at least eight separate conspiracies, petitioners were not prejudiced by the variance and "to reverse the conviction would be a miscarriage of justice" (R. 1294–1300).

The evidence against petitioners may be summarized as follows:

Simon Brown, president of the Brownie Lumber Company, undertook, for a fee, to negotiate on behalf of others F. H. A. modernization and renovation loans through banks in Brooklyn (R. 356–359, 410).[14] His usual charge for such service was five percent of the loan placed (R. 359, 664). In placing the loans Brown knew that the borrowers did not intend to use the proceeds for the purposes of alteration and repair specified in the applications, but for business and personal purposes (R. 361–367, 663–664). In a number of instances the Brownie Lumber Company was designated as the contractor to perform the work

[14] He negotiated 110 loans through one bank from which he had previously secured an F. H. A. loan for the construction of twelve houses (R. 357–359).

specified as the purpose of the loan, but no such services were actually rendered or contemplated (R. 366, 369, 372, 373, 401, 409, 663).

In May, 1939, Brown met petitioner Lekacos, who stated that he wished to make a loan in order to open up a law office (R. 388, 647). Lekacos applied for a loan for the alleged purpose of modernizing a house belonging to his father's estate (R. 388). Some of the repairs stated in the application to be the purpose of the loan had been made the year before (R. 389). In August, of 1939 Lekacos presented to Brown an application in the name of his brother Theodore and his brother's wife for another loan on other premises (R. 379–380; Govt. Ex. 4, R. 380). The loan was for $1,800, but Lekacos asked Brown not to tell Theodore the amount of the loan since Theodore thought it was for $700 (R. 380, 382). Lekacos endorsed his brother's name on the check given for such loan and, through Brown, had it cashed by Roth, a professional check casher (R. 284–286, 379, 385). When the check was rejected by the bank on which it was drawn, Theodore, in the presence of Brown and Roth, signed a statement to the effect that Lekacos had a power of attorney to sign his brother's name (Govt. Ex. 28, R. 290–291, 383, 477). A formal power of attorney was also drawn up at that time (R. 384, 386), and subsequently a notarized power of attorney, dated as of August 1, 1939, was delivered to Roth (R.

289; Govt. Ex. 27, R. 288). A contractor named in one of the applications performed no work for Lekacos (R. 176–178), and another performed minor repairs for which he was paid $40 (R. 259–261). This second contractor testified that Lekacos told him "he had me down for four hundred and some odd dollars which I did not get" (R. 351–352).

Anatasios Gerakeris, a defendant who pleaded guilty (R. 18, 35), testified that Lekacos told him that he thought Gerakeris could get a loan through Brown if he would make an application therefor in the name of Louis Gerakeris, his brother, who owned a house (R. 300–302). The application for a loan of $2,000, filled out in the name of Louis and his wife, was sent to Brown by Lekacos (R. 302–303, 392). When the check for the loan was received by Brown, Anatasios Gerakeris, in the presence of Lekacos, signed it as Louis Gerakeris, and a friend, Mrs. Vendicos, endorsed it as Louis' wife (R. 301, 304, 307). Brown gave $700 of this money to Lekacos and Mrs. Vendicos in cash, and the balance, minus his commission of $150, to them in post-dated checks (R. 305, 394). Lekacos and Mrs. Vendicos kept the cash for a time, but subsequently paid almost the full amount to Gerakeris (R. 306–307, 327, 340).

In June 1939, Lekacos sent Brown an application for a loan signed by petitioner Kotteakos (R. 436–437). This application contained a num-

ber of false statements (R. 1049–1050, 1062–1064). Brown placed the loan, and thereafter Kotteakos sent Brown a half dozen applications for loans on behalf of other persons. Kotteakos as well as Brown charged a fee for his services. Kotteakos also borrowed $800 in his own name for Brown's personal use. (R. 440–442, 446–447.) Among the applications sent to Brown by Kotteakos were one in the name of John and Mary Tierney (R. 454–456) and one in the name of Joe and Lena Sandes (R. 457; Govt. Ex. 6, R. 459).[13] No such persons existed (R. 178–179, 240–242, 254, 458–459, 712–713, 735, 811–812, 945–949). Brown's assistant, Shapiro, received the Sandes check, with endorsements on it, from Kotteakos and Regenbogen, a partner of Kotteakos in the cigarette-machine and pin-ball business (R. 1069, 1099), and had it cashed by a professional check casher (R. 667–668, 705). Shapiro gave the proceeds to Kotteakos and Regenbogen (R. 667–670; see also R. 461–463). The Tierney check was cashed by a Mr. Vassar, who bought vending machines owned by Kotteakos and Regenbogen, and the cash for that check was given to the two partners (R. 717–720, 1227–1228). A loan for $1,800 in Regenbogen's name had previously been sent to Brown by Kotteakos and placed by Brown

[13] In October 1939, a man resembling Regenbogen, using the name of Joe Sandy, rented mail and telephone service for a company known as the Regal Trucking Company (R. 280–283).

(R. 450–451). The loan was allegedly for the modernization of property which Regenbogen did not own and had not contracted to buy (R. 621–622, 752–753). Regenbogen repaid the loan about three months after receiving the money (R. 452–453).

Brown, who pleaded guilty, was a witness for the Government and, in addition to relating his dealings with petitioners, testified as to his transactions with other defendants, which, as is indicated below, constituted separate conspiracies. Briefly, the testimony as to the others was as follows:

1. Secular sent Brown about two dozen applications for loans including one by the defendant Siegel (R. 359–360, 403–410).[16] There was also testimony by one Sheiner as to a conversation between Secular and Siegel at the time Siegel signed the application (R. 814–816), and testimony by a government investigator as to his conversation with Siegel (R. 860–863). Siegel was acquitted by the jury (R. 22, 1285).

2. Joseph and Emanuel Harris told Brown that they needed money to pay creditors, and Brown placed a purported modernization loan for $2,500 for them knowing that most of the money was to be used for business purposes (R. 363–365). Brown's testimony was corroborated by testimony of a contractor that he performed only $350 worth of work for the Harris brothers (R.

[16] Secular became ill during the trial and the case was severed as to him (R. 20, 509).

175–176), and by admissions made by Emanuel Harris to investigating officers (R. 896–898). Emanuel Harris was convicted (R. 22, 1285). Joseph Harris was a fugitive from justice and the case was severed as to him (R. 19, 33).

3. Posner placed a loan through Brown which he intended to use for business purposes (R. 367–369). In making the application, Brown and Posner agreed to conceal the fact that Posner had previously obtained a loan from the Morris Plan, the proceeds of which he had lent to Brown (R. 374–376, 548–549). Posner sent Brown applications by other persons (R. 626), including that of Hyman Dvorkin, a defendant who pleaded guilty (R. 18, 33). Jennie Weissman, a defendant as to whom the case was severed (R. 19, 37), and who was the record owner of the property involved, signed the Dvorkin application (R. 370, 800). The property was actually owned by Hyman and Harry Dvorkin, Hyman's father (R. 800), who pleaded guilty (R. 18, 33). Hyman Dvorkin corroborated Brown insofar as he testified that Posner told him he could obtain a loan for business purposes through Brown (R. 798–803). Posner admitted to a government investigator that he had included in his loan $1,000 which he intended to use in his business (R. 900). The jury disagreed as to Posner (R. 22, 1285).

4. An application by Mae and Pearl Seklir for a loan of $1,250 was sent to Brown by David

Lapin (R. 395–396), who pleaded guilty (R. 18, 35). Brown was named as the contractor to perform the work, but he did not make the repairs specified (R. 396–397). Subsequently the Seklirs made another application for a loan of $1,000 in which Brown was again named as the contractor and again did not perform the work as specified (R. 398–401). The money received from this second loan was lent by the Seklirs to Brown (R. 533–534). When questioned by an F. H. A. investigator, the Seklirs stated that an oil burner had been installed with the proceeds of the first loan (R. 927–928), but Mae subsequently admitted that the work had been done several years before (R. 933; see also R. 698–699). The jury disagreed as to the Seklirs (R. 22, 1286).

5. The Litvin brothers' application was also brought to Brown by Lapin (R. 416). Brown knew that they wanted money for the construction of a used car market and for the redemption of fraudulent notes discounted with the C. I. T. Corporation (R. 420–424). A loan was obtained for the Litvins, allegedly for the conversion of their house from a one-family to a two-family house (R. 421). Subsequently, Jacob and Herman Litvin signed an application for another loan in the names of Benjamin Reuben Smith and Ann Smith, and obtained a loan on the basis of such application. Herman Litvin signed Reuben's and Brown

Ann Smith's [17] names to the check received for such loan (R. 424–429). A check of $275, supposedly for the Curley Plumbing and Heating Co., was endorsed by Herman Litvin (R. 430–431). Brown's testimony was corroborated by that of the treasurer of the Curley Company that he had done work at the Litvin market but not at their home (R. 708–709), and that, although the name of his company was on the check for $275, the signature was not his (R. 711). There was also testimony that the Litvin house was in good repair (R. 758–760), and that the Litvins had discounted fraudulent notes with the C. I. T. Corporation (R. 843–846). The Litvins were convicted (R. 22, 1285).

6. Brown testified that he did not know how the application of the defendant Wolf came into his hands (R. 608). There was evidence that work specified as the purpose of that loan had not been performed (R. 754–755). The jury disagreed as to Wolf (R. 22, 1286).

On cross-examination Brown testified that various groups of defendants did not know each other and that many of the transactions were not related (R. 560–565, 600, 608).

At the close of the Government's case, the attorney for Kotteakos moved to dismiss the indictment and to strike out all exhibits offered in evi-

[17] A verdict of acquittal was directed as to her (R. 21, 1043).

dence unless they bore the signature or initials of Kotteakos and moved to strike out all testimony unless it directly concerned a transaction with Kotteakos (R. 1041). The attorney for Lekacos moved to dismiss the indictment on the ground that the Government had failed to prove, "substantially, or in any way, the conspiracy as alleged in the indictment" (R. 1043). At the close of the whole case, the attorneys for petitioners separately moved to dismiss the indictment on the ground that the Government failed to prove the conspiracy charged (R. 1232, 1234). The motions were all denied (R. 1044–1045, 1232, 1234).

In submitting the case to the jury the judge charged (R. 1245):

> The indictment charges but one conspiracy, and to convict each of the defendants of a conspiracy the Government would have to prove, and you would have to find, that each of the defendants was a member of that conspiracy. You cannot divide it up. It is one conspiracy, and the question is whether or not each of the defendants, or which of the defendants, are members of that conspiracy.
>
> You must consider this case as to each defendant separately, because it is, in effect, a separate charge against each defendant, and, therefore, you must consider the case of each one of them separately in arriving at your verdict.

Subsequently, in relating the evidence to this charge, the judge stated (R. 1253–1254):

> The Government contends, and they have offered evidence to show, that Simon Brown was the pivot around which this whole conspiracy revolved. Have they shown that to your satisfaction? If they have, then we advance another step. What was the relation between the several defendants? Did the defendants Michael Lekacos, Louis Levine, Gus Kotteakos, Max J. Posner, James Secular, Nathan Regenbogen, bring applicants or applications from any of these defendants to Brown? Were any of these men acquainted with each other? Had they obtained loans for themselves, and after they had them, had they obtained loans for somebody else?
>
> That is the question. You have the evidence. It is certainly not all admitted. You have heard it explained to you.
>
> But if that be true, that these men were getting people to come in with Brown, then it is for you to say whether you do not find streams running through each of them to Brown, and that all of those streams led in a common direction, and they are carrying craft destined for the same place. That is the question.
>
> At least one of these applications was given to somebody. I think there was one given to Brown himself, but you can remember that. In reference to the others did they come to Brown through the

agency, or through the introduction, or through the act of solicitation of those applications by any of the men that I have mentioned?

That is important. It is important because the allegation is a conspiracy, and there must be a common purpose shown. Was that a common purpose that was intended to be accomplished, and was the conspiracy to do these things, to violate the law and to perpetrate a fraud against the Government, participated in by any or all of these defendants and did they bring others, or any of the others, to Brown? That is the question.

* * * * *

Take each defendant. Take the part they played. Did any of them sign any papers, applications, notes or checks with the intent, and, of course, with the knowledge—with the intent to commit a crime in violation of the Federal Housing Act, or with the intent to defraud the Government, and did they do that as a result of a predetermined intent and membership in a conspiracy to accomplish those things?

The jury was also given the customary conspiracy instructions that the acts and statements of any conspirator could be considered against his fellow conspirators if in furtherance of the conspiracy (R. 1249), and that at least one overt

act by a member of the conspiracy must be proved (R. 1249–1250).

Posner's attorney excepted to the judge's statement that "You cannot divide up this charge" (R. 1259). He also excepted to the judge's refusal to submit to the jury the question whether there was more than one conspiracy (R. 1260) as well as his refusal to instruct that if the jury found from the evidence that more than one conspiracy was established it must acquit Posner (R. 1259; Request No. 11, R. 1265), the judge stating that he had ruled on that as a matter of law (R. 1259). These exceptions were made available to all defendants (R. 1261).

SUMMARY OF ARGUMENT

I. The evidence discloses that various groups of defendants operated independently through the same central figure to violate the National Housing Act by means of fraudulent applications for loans to be insured by the Federal Housing Administration. The pattern is that of separate spokes meeting in a common center. We agree with the court below that the mere presence of a common central figure does not establish one conspiracy among the defendants who were not joined by a common interest, and that there was therefore a variance between the indictment charging one conspiracy and the proof establishing several conspiracies. However, petitioners themselves were closely linked with each other and, as

to them, the proof showed two interlocking conspiracies. Moreover, the jury convicted only two groups in addition to petitioners—the Litvin brothers, who acted together, and that involving Emanuel Harris. There is thus before this Court a situation in which the indictment charged one conspiracy, and the evidence established two closely related conspiracies involving petitioners, and two additional analogous conspiracies in which petitioners played no part.

II. Under *Berger* v. *United States*, 295 U. S. 78, 82, a variance between an indictment charging one conspiracy and proof establishing several conspiracies is immaterial unless it affects the "substantial rights" of a defendant. Here, we submit, petitioners' substantial rights were not affected.

A. *The indictment.*—The indictment charged a conspiracy of the nature proved against each of the petitioners, including an overt act performed by each, and was sufficiently specific to enable them to prepare their defense. There is no basis for a claim of surprise that the evidence dealt with many others. There can be no doubt that petitioners are adequately protected against a second prosecution.

B. *The trial.*—1. The mere inconvenience of a longer trial, with the incidental increased expense, cannot be of consequence if the ability of the jury to reach a just verdict was not affected by the variance.

2. The evidence as a whole, and particularly the cross-examination of the Government's principal witness, Brown, made it abundantly clear to the jury that petitioners were not implicated in the acts of the other defendants. That the jury was not in fact confused by the evidence offered as to others and did not impute the acts of one defendant to another is shown by their failure to convict six of the thirteen defendants whose cases were submitted to them.

3. The fact that the Government's principal witness, Brown, was corroborated to some extent did not prejudice petitioners. The action of the jury in failing to convict a number of defendants who were implicated by Brown shows that they did not give blanket credence to Brown's testimony; that they considered the various defendants on an individual basis.

C. *The charge.*—1. The judge's charge that "The indictment charges but one conspiracy * * *. You cannot divide it up" must be considered together with the subsequent portions of his charge in which he, in substance, told the jury that it must find facts which would necessarily establish that each defendant was an active participant in a lesser conspiracy with Brown. Hence, his improper characterization of the facts as constituting but one conspiracy cannot in itself be considered prejudicial.

2. Although the judge erred in instructing the jury that, if membership in the conspiracy were

found, the acts of one conspirator could be imputed to others, and that only one overt act need be proved, such error does not in this case constitute substantial prejudice. Under the judge's charge, the jury was required first to find that a particular defendant had joined the conspiracy. The only evidence before the jury to establish the fact of joinder was evidence that each petitioner had performed overt acts of direct participation. Hence, in finding that petitioners joined the conspiracy, the jury must have credited evidence which, in itself, completely established guilt on the part of each petitioner, including the performance of an overt act. The erroneous instructions by the judge did not become operative until the jury had first found the facts establishing guilt. Since the error in the judge's charge did not reach the essential factors by which guilt or innocence had to be determined, it does not constitute reversible error.

The case does not differ in vital respects from the *Berger* case and the line of decisions in the lower courts which have been rendered upon the strength of that case. The decision in that case is in accord with the mandate of the "harmless error" statute and is in harmony with the modern tendency on the part of the courts and the law-making bodies to liberalize the old technical rules of pleading and proof.

ARGUMENT

I

THE EVIDENCE THAT DIFFERENT GROUPS OF DEFENDANTS OPERATED THROUGH THE SAME CENTRAL FIGURE IN PLACING FRAUDULENT F. H. A. LOANS ESTABLISHES, NOT ONE, BUT SEVERAL SEPARATE CONSPIRACIES

The evidence in this case discloses that various groups of defendants operated independently through Brown to violate the National Housing Act by means of fraudulent applications for loans to be insured by the Federal Housing Administration. The pattern is that of separate spokes meeting at a common center. We agree with the court below that the mere presence of a common central figure does not necessarily establish one conspiracy among all the defendants making up the various spokes. We think the United States Attorney and the trial judge were misled by statements appearing in some decisions which, on other facts, have found one conspiracy established "where a common thread runs through all of the actions and a common purpose animates all of the conspirators,"[18] and by the general rules of conspiracy law that one may be held liable as a conspirator although he does not know the full scope of the

[18] *United States* v. *New York Great Atlantic and Pacific Tea Co.*, 137 F. 2d 459, 463 (C. C. A. 5), certiorari denied, 320 U. S. 783; *Wyatt* v. *United States*, 23 F. 2d 791, 792 (C. C. A. 3), certiorari denied, 277 U. S. 588.

conspiracy and does not participate in all its acts,[19] and that one who joins a conspiracy later is responsible for all that has gone before.[20]

In our opinion the "common thread" must be more than a general similarity of purpose and more than the presence of one common central figure. Where a person joins an enterprise which he knows requires participation of others for its success, he may properly be held liable for the acts of the others, although he is unaware of their identity, or even of the exact nature of their contribution to the common cause. Thus, in cases involving liquor or narcotics rings, it has been held that different groups, sometimes operating in scattered parts of the country, were properly joined under one conspiracy charge, since all were aware that they were part of a larger enterprise and that their stake in the venture was dependent upon the success of other groups. *United States* v. *Bruno*, 105 F. 2d 921 (C. C. A. 2), reversed on other grounds, 308 U. S. 287; *United States* v. *Feinberg*, 123 F. 2d 425 (C. C. A. 7), certiorari denied, 315 U. S. 801; *Chadwick* v. *United States*, 117 F. 2d 902 (C. C. A. 5), certiorari denied, 313 U. S. 585. See also *Martin* v. *United States*, 100 F. 2d 490, 495 (C. C. A. 10), certiorari denied,

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[19] *United States* v. *Valenti*, 134 F. 2d 362, 365 (C. C. A. 2); *Lefco* v. *United States*, 74 F. 2d 66, 69 (C. C. A. 3).

[20] *Silkworth* v. *United States*, 10 F. 2d 711, 717 (C. C. A. 2), certiorari denied, 271 U. S. 664.

306 U. S. 649, involving a nation-wide plan to violate the Motor Carrier Act. One central figure or one central group may be sufficient to bind many separate individuals together into one conspiracy under certain circumstances, as for example, when the central group dominates the enterprise, and the lesser members know that they are merely a small part of a greater plan. See *United States* v. *New York Great Atlantic and Pacific Tea Co.*, 137 F. 2d 459, 463 (C. C. A. 5), certiorari denied, 320 U. S. 783; *Oliver* v. *United States*, 121 F. 2d 245, 248 (C. C. A. 10), certiorari denied, 314 U. S. 666; *Silkworth* v. *United States*, 10 F. 2d 711, 717 (C. C. A. 2), certiorari denied, 271 U. S. 664. This case, however, fits neither of these patterns. Although the various persons who brought loans to Brown or placed loans through him on their own behalf may have had reason to believe that Brown was accepting fraudulent applications from others, there was no interdependency between their plans to obtain money for themselves or their friends and the similar plans of others operating through Brown. So long as Brown was able to carry on without detection, each group was interested only in its own immediate venture. Each had an interest in common with Brown but not with each other. Brown did not in any sense dominate and control the persons who placed loans through him so as to tie them to one common venture. He was merely giving

his services to each group in turn, rather than bringing them all together for a general common purpose. We admit, therefore, that the evidence at the trial did establish, not one, but several separate conspiracies, and that to such extent there was a variance between the indictment and the proof.

It should be noted, however, that petitioners themselves were closely linked with each other. While Lekacos dealt with Brown both on his own behalf and on behalf of Gerakeris, Lekacos placed Kotteakos' first loan and introduced Kotteakos to Brown. Kotteakos placed the Regenbogen loan through Brown and Regenbogen and Kotteakos acted together with Brown in the Tierney and Sandes hoax. The circumstances indicate the existence of two closely related conspiracies—one among Lekacos, Gerakeris and Brown (pp. 6–7, *supra*), and one among Kotteakos, Regenbogen and Brown (pp. 7–9, *supra*)—which interlocked with each other.

It should also be noted that, in its present posture, the case does not present the picture of eight or more different conspiracies. The jury convicted only four persons in addition to petitioners—the Litvin brothers, who all acted together, and Emanuel Harris. The other defendants and the evidence relating to them were in effect eliminated from the case. There is thus before this Court for consideration a situation in which the indictment charged one conspiracy, and

the evidence established two closely related conspiracies involving petitioners, and two additional conspiracies in which petitioners played no part, all of the same character and all revolving about the same central figure.

II

THE VARIANCE BETWEEN THE CHARGE OF ONE CONSPIRACY AND THE PROOF OF SEVERAL SEPARATE CONSPIRACIES DID NOT AFFECT PETITIONERS' SUBSTANTIAL RIGHTS AND HENCE DOES NOT CONSTITUTE REVERSIBLE ERROR

This Court decided in *Berger* v. *United States*, 295 U. S. 78, 82, that the mere fact of variance between an indictment charging one conspiracy and proof establishing the existence of two or more conspiracies would not in itself warrant reversal of a conviction.[a] The variance must be such as to affect the "substantial rights" of a defendant. In our view, this means that a variance is immaterial unless there is at least a reasonable likelihood that as a result thereof the jury may have applied erroneous principles in determining guilt. That question necessarily depends, not on general theories, but on the particular facts of a

[a] In the *Berger* case the indictment charged a single conspiracy involving Katz, Rice, Jones, and Berger to utter counterfeit notes. The proof disclosed one conspiracy between Katz and Rice to utter counterfeit notes for one purpose and another distinct conspiracy between Katz, Jones, and Berger to utter counterfeit notes for another purpose.

particular case. Here, we submit, no such reasonable likelihood of prejudice to petitioners has been shown."

A. *The indictment.*—In the *Berger* case this Court said (p. 82) that "The general rule that allegations and proof must correspond is based upon the obvious requirements (1) that the accused shall be definitely informed as to the charges against him, so that he may be enabled to present his defense and not be taken by surprise by the evidence offered at the trial; and (2) that he may be protected against another prosecution for the same offense."

(1) There can be no doubt that the indictment met the first requirement. It charged that the defendants were members of a conspiracy to violate the National Housing Act by submitting false and fraudulent applications for modernization loans. This was precisely the kind of conspiracy proved against each conspirator.

" We do not believe the discussion of the problem is advanced by considering, as did the court below (R. 1297–1298), whether the several conspiracies might have been charged as separate counts in one indictment. The indictment itself presented no problem of misjoinder. What occurred was a variance between allegation and proof. In that aspect the problem is not whether the conspiracies might properly have been joined but whether it seems likely that prejudice to the substantial rights of an accused may have ensued from the variance, and it is similar to that which exists where a misjoinder in the case of substantive charges is disclosed by the evidence. Cf. *United States* v. *Tuffanelli*, 131 F. 2d 890 (C. C. A. 7), certiorari denied, 318 U. S. 772.

The indictment also averred specific overt acts by each conspirator as well as by persons the proof showed to be tied with him. As to petitioner Lekacos the indictment charged as overt acts his signing of his application of May 2, 1939 (Overt Act 12, R. 10), his meeting with Gerakeris (Overt Act 20, R. 12), and the acts of Gerakeris in meeting Brown and signing his brother's name to the check received for the loan (Overt Acts 21 and 22, R. 13). As to petitioners Kotteakos and Regenbogen, the indictment alleged as overt acts the signing by Kotteakos of the application for his first loan (Overt Act 17, R. 12), the signing by Regenbogen of his application for a loan (Overt Act 18, R. 12), the receipt by both of these petitioners of the proceeds of the Sandes loan (Overt Act 15, R. 11), and Brown's presentation of the Tierney application (Overt Act 16, R. 11). It is to be noted that all these overt acts were significant acts in furtherance of the particular conspiracy in which each petitioner participated and that all of them were established by the evidence.

Petitioners can hardly plead surprise that the proof concerned many others, for the indictment advised them that there were numerous other defendants. If, as is clear, petitioners would not have been misled in the event that a single conspiracy had been established but some of the defendants were not shown to be connected with it, it is difficult to see how they were any more mis-

led because the proof established that some of the defendants were guilty of other similar conspiracies. Seldom can a defendant know precisely what the proof will show, but it must have been evident to petitioners that they must be prepared to defend against proof that they conspired with at least one of those named in the indictment. This being so, we submit that the variance cannot be considered fatal on the ground that it confused or misled petitioners in preparing for trial.

(2) It is clear that petitioners are adequately protected against a second prosecution. The indictment is sufficiently descriptive and the evidence in the record is available to disclose the proof on which the convictions were based. Parol evidence is available in addition. *Bartell* v. *United States,* 227 U. S. 427, 433. This Court in *Berger's* case had no doubt that he was adequately protected against further prosecution (p. 83).

B. *The trial.*—1. *Length of the trial.*—Petitioners assert (Br. 25–27) that they were substantially prejudiced in that the joinder of numerous defendants caused a longer trial than would otherwise have been necessary, with consequent increased expense for counsel fees, transcript of record, printing of record on appeal, etc. Mere inconvenience, however, does not establish unfairness in the trial. The variance can be of

consequence only if, by reason of its incidentals, the ability of the jury to reach a just verdict has been affected. If the petitioners were not deprived of the essentials of a fair trial and were justly convicted, the expense of the first trial is no reason for subjecting them to a second.

2. *Danger of confusion.*—Ordinarily, the greatest possibility of prejudice which may arise when several conspiracies are tried together is the danger that the jury will be confused and convict one person on evidence relating to another. Whatever may be the situation in some other case, that danger is nonexistent here. While there were several conspiracies proved, the pattern of the evidence is simple. The evidence as a whole, and particularly the cross-examination of Brown, made it abundantly clear to the jury that the only reason petitioners and the other defendants were tried together was that all of them worked through Brown. The evidence as to the other defendants, whether by Brown or by the contractors or government investigators, in no way implicated petitioners. On the other hand, there was ample evidence, by Brown and by other witnesses, that each of the petitioners had directly participated in a conspiracy with Brown by himself making a fraudulent application for a loan, as well as bringing in others. In the face of these facts, it is inconceivable that a jury could have confused the question of petitioners' guilt with

that of any of the other defendants. As the court below stated (R. 1298):

> The guilt of the three appellants turned upon whether they had deliberately misstated their intent when they borrowed the money. The applications were in evidence and were undisputed; the evidence as to how they had spent the money depended upon the testimony of the investigators and of workmen; certainly the testimony that other applicants had used the money otherwise than they had stated that they intended, could not have persuaded the jury that the appellants had done the same thing with their money. * * *

All that petitioners' contention in this respect (Br. 12–15) amounts to is that incompetent evidence, in no way implicating petitioners, was admitted at their trial. Courts have frequently refused to reverse convictions on this ground. *United States* v. *Nimerick,* 118 F. 2d 464, 466 (C. C. A. 2), certiorari denied, 313 U. S. 592; *Grell* v. *United States,* 112 F. 2d 861, 873 (C. C. A. 8); *Shreve* v. *United States,* 103 F. 2d 796, 809 (C. C. A. 9), certiorari denied, 308 U. S. 570; *Capriola* v. *United States,* 61 F. 2d 5, 9 (C. C. A. 7), certiorari denied, 287 U. S. 671. As this Court said in the *Berger* case, *supra* (p. 83), "The proof here in respect of the conspiracy with which Berger was not connected may, as to him, be regarded as incompetent; but we are unable to

find anything in the facts * * * or in the record from which it reasonably can be said that the proof operated to prejudice his case."

That the jury was not in fact confused by the evidence offered as to defendants other than petitioners, and that they did not impute the acts of one defendant to another, is indicated by their failure to convict six of the thirteen defendants on trial before them.

3 *Corroboration of Brown.*—The court below thought that the only possible indirect prejudice to petitioners as a result of the joint trial which required extended consideration was the possibility that the jury might have been more ready to accept Brown's testimony as to his dealings with petitioners because Brown was corroborated to some extent in respect of his testimony as to other defendants. (R. 1298.) We submit that the court below properly held that this did not represent substantial prejudice to petitioners. In only three of the four instances pointed out by the court (R. 1298–1299), did the corroborative evidence relate to any one of the petitioners. But it seems fair to assume that the corroboration of Brown in these respects had no more influence upon the jury in appraising the transactions of the other petitioners than it had when the jury gave consideration to Brown's testimony as to his dealings with those defendants whom the jury refused to convict. Certainly corroborative evi-

dence as to those defendants as to whom the jury did not return a verdict of guilty could not have prejudiced petitioners since the jury did not find such evidence of sufficient weight to establish the guilt of persons to whom it directly related. The action of the jury in failing to convict a number of defendants who were implicated by Brown shows that they did not give blanket credence to Brown's testimony; that as to each defendant the jury gave consideration only to the evidence which bore immediately upon that defendant.

C. *The charge.*—1. *The direction to find a single conspiracy.*—The judge's charge (R. 1245) that "The indictment charges but one conspiracy * * *. You cannot divide it up," must be considered together with the subsequent portions of his charge, quoted at pp. 14–15, *supra*, relating this general instruction to the evidence in the case. The judge in substance told the jury that they must find a single conspiracy if they found that Lekacos, Kotteakos, Regenbogen, and several others were bringing applications to Brown; that "these men were getting people to come in with Brown"; and that "it is for you to say whether you do not find streams running through each of them to Brown"; as to the others, he charged that they must have come to Brown through the agency of the defendants he had named (R. 1253). He further charged that, as to each defendant, the

jury must consider the "part [he] played"; for example, whether he signed documents with intent to violate the Housing Act as the result of a predetermined intent to defraud and complicity in a conspiracy to accomplish such purpose (R. 1254).

It is thus evident that, although the judge wrongly assumed that if all the defendants dealt through Brown one conspiracy would be established, he required the jury to find facts which would necessarily establish that each defendant was an active participant in a lesser conspiracy with Brown before he could be convicted. In view of the judge's explicit instruction as to the facts which would properly establish guilt, his improper characterization of the facts as constituting one conspiracy amounts to no more than a misnomer and cannot in itself be considered prejudicial.[23]

2. *The instruction as to overt acts and the imputation of the act of one conspirator to others.*— In accordance with his theory that the indictment properly charged a single conspiracy if the jury found streams running from the applicants through the application-bringers to Brown, the

[23] We think there is no basis for the statement in the opinion below that the jury was instructed that they must find one conspiracy, or else acquit (R. 1299). It is quite evident that the trial judge was of the view that the indictment properly charged one conspiracy and that the only question was whether particular defendants had been connected with that conspiracy. See, e. g., *supra*, p. 16.

judge gave the following instructions to the jury (R. 1249–1250):

> If you find that there was a conspiracy and that any of these defendants were members of that conspiracy, then the acts or the statements of any of those whom you so find to be conspirators between the two dates that I have mentioned, may be considered by you in evidence as against all of the defendants whom you so find to be members of the conspiracy.
>
> Of course, if you should find that any one of them was not a member of the conspiracy, then it would not make any difference, because that would be the end of it as far as that one was concerned.
>
> But the acts or statements of the co-conspirator must be acts or statements which are in furtherance of a common purpose, and that is for violating the law with reference to the application for defrauding the Government.
>
> * * * * *
>
> * * * It is not necessary, as a matter of law, that an overt act be charged against each defendant. It is sufficient if the conspiracy be established and the defendant be found to be a member of the conspiracy—it is sufficient to allege overt acts on the part of any others who may have been members of the conspiracy, if those acts were done in furtherance of, and for the purpose of accomplishing the conspiracy.
>
> * * * * *

> * * * But in order to vitalize the conspiracy at least one overt act must be proven, because the one overt act is the allegation of the doing of something in furtherance of the conspiracy, and that vitalizes it, and from that time on everybody who was a member of the conspiracy, and had not openly disavowed and withdrawn from it, would be a conspirator. * * *

Since the evidence established, not one, but several conspiracies, these instructions that the acts of one conspirator could be imputed to all and that only one overt act need be proved were, of course, erroneous. Nevertheless, we do not think that this error requires reversal of the conviction.

Under the judge's charge, the jury was required, before it could impute the acts of one conspirator to another defendant, to find first that that particular defendant had joined the conspiracy. This was emphasized not only in the portion of the charge quoted above but throughout. Thus, the jury was told to "consider each defendant separately" (R. 1245) and to "Take each defendant" and consider the part he played (R. 1254; see also R. 1249, 1252). This constant admonition first to consider whether an individual defendant was independently connected with the conspiracy, we submit, removes any possibility of prejudice from the charge as to the imputation of the acts of one conspirator to the others. The evi-

dence connecting each of the petitioners to a conspiracy with Brown was evidence that each of them had himself made a fraudulent application for a loan. In addition, as to petitioner Lekacos, there was also evidence of the Gerakeris transaction testified to by Brown and by Gerakeris himself; as to Kotteakos and Regenbogen, there was not only Brown's testimony but also the testimony of a completely disinterested witness, Mr. Vassar, as to the cashing of the Tierney check, as well as the testimony of Brown's employee, Shapiro, as to the cashing of the Sandes check. The only kind of evidence which was before the jury to establish petitioners' membership in a conspiracy was evidence that petitioners themselves had performed acts of direct participation in a conspiracy. Hence, in finding that petitioners joined a conspiracy, the jury at that point must have credited evidence which completely established guilt. This is not a situation in which membership in a conspiracy is shown by slight evidence of knowledge and association, and the acts of others must be imputed to a defendant to establish guilt beyond a reasonable doubt. The only defendants other than petitioners whom the jury found to be members of the conspiracy charged were the Litvins and Emanuel Harris. As appears from the Statement, pp. 9–10, 11–12, *supra*, none of the testimony as to these defendants in any way implicated petitioners. Clearly, the jury could not have considered that

testimony in determining whether petitioners were members of a conspiracy. In order to find that petitioners joined a conspiracy at all, the jury had to believe evidence directly relating to petitioners' acts which in itself proved guilt irrespective of whether petitioners were or were not to be held responsible for the acts of the other defendants found guilty.

Similarly, under the evidence in this case, the jury could not have found that petitioners joined a conspiracy with Brown without necessarily finding that each committed an overt act in furtherance of the conspiracy. As we have shown, the indictment charged overt acts performed by each of the petitioners, as well as overt acts performed by other persons tied to the particular conspiracy of which each petitioner was a part. The jury could not have found that Lekacos entered into a conspiracy with Brown without also finding either that his application of May 2, 1939, was false (Overt Act 12, R. 10), or that he was an active participant in the Gerakeris transaction (Overt Acts 20–22, R. 12–13). The jury must also have found, as to Kotteakos, either that he signed a false application himself (Overt Act 17, R. 12), or that he participated in the Sandes or Tierney hoax (Overt Acts 15 and 16, R. 11); and as to Regenbogen, either that he made a false application himself (Overt Act 18, R. 12), or that he participated in the Sandes and Tierney transactions (Overt Acts 15 and 16, R. 11). Since the

evidence of petitioner's membership in a conspiracy was evidence of their overt acts in furtherance thereof, petitioners could not have been prejudiced by the charge as to overt acts. At the point the jury found that each of the petitioners had entered into a conspiracy with Brown, it necessarily made a complete determination of guilt as to that petitioner.

We recognize that where there has been an erroneous instruction as to the standards that determine guilt, this Court will not speculate as to its probable effect on the jury. *Bollenbach* v. *United States*, No. 41, this Term, decided January 28, 1946; *Weiler* v. *United States*, 323 U. S. 606, 611. See also *Bruno* v. *United States*, 308 U. S. 287. Here, however, the erroneous instructions could not become operative until the jury had first found membership in the conspiracy alleged, i. e., until the jury had first credited facts which in themselves completely established guilt. Hence, we think the erroneous instructions here involved did not have operative force which would render the error harmful. It is obvious that the doctrine of the *Berger* case becomes meaningless if the mere giving of the customary charges as to overt acts and the imputation of the acts of one conspirator to others *ipso facto* renders a variance in the number of conspiracies a fatal defect. The same instructions were in fact given in the *Berger* case (No. 544, O. T. 1934, R. 483, 484). Similar instructions were given in a number of

other cases in which a variance was found but held not to have been prejudicial. *United States* v. *Rosenberg*, 150 F. 2d 788, 793 (C. C. A. 2), certiorari denied, October 15, 1945 (Nos. 325 and 326, this Term, R. 1540–1541, 1944); *United States* v. *Liss*, 137 F. 2d 995 (C. C. A. 2), certiorari denied, 320 U. S. 773 (Nos. 282–287, O. T. 1943, R. 786, 788, 789); *Kopald-Quinn & Co.* v. *United States*, 101 F. 2d 628, 633 (C. C. A. 5), certiorari denied, *sub nom. Ricebaum* v. *United States*, 307 U. S. 628 (Nos. 861, 871, O. T. 1938, R. 1875); *United States* v. *Manton*, 107 F. 2d 834, 849–850 (C. C. A. 2), certiorari denied, 309 U. S. 664 (Nos. 645, 646, O. T. 1939, R. 830, 838). In each of these cases, the facts showed that the appealing defendants were all direct actors in the conspiracy, and that, in finding membership in the conspiracy, the jury must necessarily have found guilty participation. In some of these cases, the judge, in summarizing the evidence, pointed out that the appealing defendants were members of the conspiracy only if they performed certain acts. For example, in the *Berger* case, the trial judge said, "Did this defendant Berger * * * act as the intermediary between Katz and Jones, or did he not? If he didn't, he is out, there is no question about that" (Record 483). See also *Manton* Record 853–856; *Rosenberg* Record 1556–1560. Manifestly, such a direction cured any possible harmful effects of the erroneous general charge. See *United States* v. *Manton*, 107 F. 2d

834, 849 (C. C. A. 2), certiorari denied, 309 U. S. 664. In this case the situation is similar.

The judge instructed the jury (R. 1253–1254)—

> * * * Did the defendants Michael Lekacos, Louis Levine, Gus Kotteakos, Max J. Posner, James Secular, Nathan Regenbogen, bring applicants or applications from any of these defendants to Brown? * * * Had they obtained loans for themselves, and after they had them, had they obtained loans for somebody else?
>
> * * * * *
>
> Let us get it perfectly straight, so there won't be any question about it. This charge is that they, each and all of them, conspired, confederated, and agreed to violate the law by making false statements in their applications and by perpetrating a fraud on the Government by getting loans that they should not have gotten either because they had no right under their statement to get them, or because they were not the parties who were named to be getting them, or because they were getting them in the name of parties who did not know anything about it.
>
> Did they conspire to do the things? Now, did they do them?
>
> * * * * *
>
> Take each defendant. Take the part they played. Did any of them sign any papers, applications, notes or checks with the intent, and, of course, with the knowledge—with the intent to commit a crime in

> violation of the Federal Housing Act, or with the intent to defraud the Government, and did they do that as a result of a predetermined intent and membership in a conspiracy to accomplish those things.

Under this charge, considered in relation to the type of evidence which was presented as to petitioners, the jury could not have found that petitioners joined a conspiracy without also finding that they performed overt acts of direct participation. The error in the other portions of the charge thus did not reach the essential factors by which guilt or innocence must be determined, and therefore did not, we submit, constitute reversible error.

The case does not differ in essential respects from the *Berger* case and other cases in the circuit courts of appeals which have been decided on the strength of it.[24] That case makes it clear that error is not to be presumed merely because a single conspiracy charged splits into several conspiracies, and that each record must be scrutinized to determine whether the substantial rights of a defendant have been affected. The contrary technique of presuming error in such circumstances is not only opposed to the mandate of the

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[24] See list of cases in footnote in *United States* v. *Cohen*, 145 F. 2d 82 (C. C. A. 2) at p. 89, to which should be added *United States* v. *Rosenberg*, 150 F. 2d 788, 793 (C. C. A. 2), certiorari denied, October 15, 1945 (Nos. 325 and 326, this Term).

"harmless error" statute (*infra*, p. 44) but is a departure from the modern tendency of courts and law-making bodies to liberalize the old technical rules of pleading and proof. (See the historical discussion of the variance rule in the Government's brief in the *Berger* case, No. 544, O. T. 1934, at pp. 25–28.) The principle of the *Berger* decision is sound and is, we submit, controlling here.

CONCLUSION

The variance between the charge of one conspiracy and the proof of several conspiracies did not affect petitioners' substantial rights and hence does not constitute grounds for reversal. We therefore respectfully submit that the judgments below should be affirmed.

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FEBRUARY 1946.

APPENDIX

STATUTORY PROVISIONS

The pertinent provisions of Title I of the "National Housing Act" of June 27, 1934, as amended in 1938 (12 U. S. C. 1703, 1731), pertaining to housing renovation and modernization, referred to in the indictment (R. 4), are as follows:

SUBCHAPTER I.—HOUSING RENOVATION AND MODERNIZATION

* * * * *

§1703. *Insurance of financial institutions.* (a) The Administrator is authorized and empowered upon such terms and conditions as he may prescribe, to insure banks, trust companies, personal finance companies, mortgage companies, building and loan associations, installment lending companies, and other such financial institutions, which the Administrator finds to be qualified by experience or facilities and approves as eligible for credit insurance, against losses which they may sustain as a result of loans and advances of credit, and purchases of obligations representing loans and advances of credit, made by them on and after July 1, 1939, and prior to July 1, 1941, for the purpose of financing alterations, repairs, and improvements upon or in connection with existing structures, and the building of new structures, upon urban, suburban, or rural real property (including the restoration, rehabilitation, rebuilding, and re-

placement of such improvements which have been damaged or destroyed by earthquake, conflagration, tornado, hurricane, cyclone, flood, or other catastrophe), by the owners thereof or by lessees of such real property under a lease expiring not less than six months after the maturity of the loan or advance of credit. In no case shall the insurance granted by the Administrator under this section to any such financial institution on loans, advances of credit, and purchases made by such financial institution for such purposes on and after July 1, 1939, exceed 10 per centum of the total amount of such loans, advances of credit, and purchases. * * *

* * * * * *

SUBCHAPTER V.—MISCELLANEOUS

§ 1731. *Penalties.*

(a) Whoever, for the purpose of obtaining any loan or advance of credit from any person, partnership, association, or corporation with the intent that such loan or advance of credit shall be offered to or accepted by the Federal Housing Administration for insurance, or for the purpose of obtaining any extension or renewal of any loan, advance of credit, or mortgage insured by the said Administration, or the acceptance, release, or substitution of any security on such a loan, advance of credit, or for the purpose of influencing in any way the action of the said Administration under this chapter, makes, passes, utters, or publishes, or causes to be made, passed, uttered, or published any statement, knowing the same to be false, or alters, forges, or counterfeits, or causes or procures to be altered, forged, or counterfeited, any in-

strument, paper, or document, or utters, publishes, or passes as true, or causes to be uttered, published, or passed as true, any instrument, paper, or document, knowing it to have been altered, forged, or counterfeited, or willfully overvalues any security, asset, or income, shall be punished by a fine of not more than $3,000 or by imprisonment for not more than two years, or both.

* * * * *

Section 37 of the Criminal Code (18 U. S. C. 88) provides:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

Section 269 of the Judicial Code, as amended (28 U. S. C. 391), provides:

* * * On the hearing of any appeal, certiorari, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.

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SUPREME COURT OF THE UNITED STATES.

Nos. 457, 458.—October Term, 1945.

457	Gus Kotteakos and Michael Lekacos, Petitioners, *vs.* The United States of America.	On Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.
458	Nathan Regenbogen, Petitioner, *vs.* The United States of America.	

[June 10, 1946.]

Mr. Justice Rutledge delivered the opinion of the Court.

The only question is whether petitioners have suffered substantial prejudice from being convicted of a single general conspiracy by evidence which the Government admits proved not one conspiracy but some eight or more different ones of the same sort executed through a common key figure, Simon Brown. Petitioners were convicted under the general conspiracy section of the Criminal Code, 18 U. S. C. § 88, of conspiring to violate the provisions of the National Housing Act, 12 U. S. C. §§ 1702, 1703, 1715, 1731. The judgments were affirmed by the Circuit Court of Appeals. 151 F. 2d 170. We granted certiorari because of the importance of the question for the administration of criminal justice in the federal courts. — U. S. ——.

The indictment named thirty-two defendants, including the petitioners.[1] The gist of the conspiracy, as alleged, was that the defendants had sought to induce various financial institutions to grant credit, with the intent that the loans or advances would then be offered to the Federal Housing Administration for insurance upon applications containing false and fraudulent information.[2]

Of the thirty-two persons named in the indictment nineteen were brought to trial[3] and the names of thirteen were submitted

[1] Four other persons were alleged to be conspirators but were not made defendants.

[2] It was also alleged that as part of the conspiracy the defendants would solicit persons desiring to make loans not in conformity with the rules and

to the jury.[4] Two were acquitted; the jury disagreed as to four; and the remaining seven, including petitioners, were found guilty.

The Government's evidence may be summarized briefly, for the petitioners have not contended that it was insufficient, if considered apart from the alleged errors relating to the proof and the instructions at the trial.

Simon Brown, who pleaded guilty, was the common and key figure in all of the transactions proven. He was president of the Brownie Lumber Company. Having had experience in obtaining loans under the National Housing Act, he undertook to act as broker in placing for others loans for modernization and renovation, charging a five per cent commission for his services. Brown knew, when he obtained the loans, that the proceeds were not to be used for the purposes stated in the applications.

In May, 1939, petitioner Lekacos told Brown that he wished to secure a loan in order to finance opening a law office, to say the least a hardly auspicious professional launching. Brown made out the application, as directed by Lekacos, to state that the purpose of the loan was to modernize a house belonging to the estate of Lekacos' father. Lekacos obtained the money. Later in the same year Lekacos secured another loan through Brown, the application being in the names of his brother and sister-in-law. Lekacos also received part of the proceeds of a loan for which one Gerakeris, a defendant who pleaded guilty, had applied.

In June, 1939, Lekacos sent Brown an application for a loan signed by petitioner Kotteakos. It contained false statements

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regulations prescribed by the National Housing Administrator, which limited the making of such loans for modernizing and altering existing structures in amounts not to exceed $2500; and would represent to those persons that money obtained through false and fraudulent applications could be used for purposes not within the contemplation of Title 1 of the National Housing Act. The defendants would procure various documents, e. g., credit statements and certificates falsely stating that work contracted for had been completed and material delivered; and on the basis of these documents, which were presented to the various financial institutions and to the Federal Housing Administration, would obtain loans, the proceeds of which would be used for purposes other than housing renovation and modernization.

[3] As to four a severance was granted. The indictment was nol-prossed as to one, and eight others pleaded guilty.

[4] One pleaded guilty during trial. The indictment was nol-prossed as to another, and a severance was ordered for a third. Verdicts of acquittal were directed as to three others.

[5] The application stated that the house on which the loan was sought was bought in 1936 rather than in 1938, that the purchase price was $8500 rather

Brown placed the loan, and Kotteakos thereafter sent Brown applications on behalf of other persons. Two were made out in the names of fictitious persons. The proceeds were received by Kotteakos and petitioner Regenbogen, his partner in the cigarette and pinball machine business. Regenbogen, together with Kotteakos, had indorsed one of the applications. Kotteakos also sent to Brown an application for a loan in Regenbogen's name. This was for modernization of property not owned by Regenbogen. The latter, however, repaid the money in about three months after he received it.

The evidence against the other defendants whose cases were submitted to the jury was similar in character. They too had transacted business with Brown relating to National Housing Act loans. But no connection was shown between them and petitioners, other than that Brown had been the instrument in each instance for obtaining the loans. In many cases the other defendants did not have any relationship with one another, other than Brown's connection with each transaction. As the Circuit Court of Appeals said, there were "at least eight, and perhaps more, separate and independent groups, none of which had any connection with any other, though all dealt with Brown as their agent." 151 F. 2d at 172. As the Government puts it, the pattern was "that of separate spokes meeting at a common center," though we may add without the rim of the wheel to enclose the spokes.

The proof therefore admittedly made out a case, not of a single conspiracy, but of several, notwithstanding only one was charged in the indictment. Cf. *United States* v. *Falcone*, 311 U. S. 205; *United States* v. *Peoni*, 100 F. 2d 401; *Tinsley* v. *United States*, 43 F. 2d 890, 892-893. The Court of Appeals aptly drew analogy in the comment, "Thieves who dispose of their loot to a single receiver—a single 'fence'—do not by that fact alone become confederates; they may, but it takes more than knowledge that he is a 'fence' to make them such." 151 Fed. 2d at 173. It stated that the trial judge "was plainly wrong in supposing that upon the evidence there could be a single conspiracy; and in the view he took of the law, he should have dismissed the indictment." 151 F. 2d at 172. Nevertheless the appellate court held the error

than $7200, and that the assessed valuation was $9500 rather than $6500. The application further stated that among the repairs contemplated was a repainting of the house, whereas in fact only the basement hallway and garage were repainted.

not prejudicial, saying among other things that "especially since guilt was so manifest, it was 'proper' to join the conspiracies," and "to reverse the conviction would be a miscarriage of justice."[6] This is indeed the Government's entire position. It does not now contend that there was no variance in proof from the single conspiracy charged in the indictment. Admitting that separate and distinct conspiracies were shown, it urges that the variance was not prejudicial to the petitioners.

In *Berger* v. *United States*, 295 U. S. 78, this Court held that in the circumstances presented the variance was not fatal where one conspiracy was charged and two were proved, relating to contemporaneous transactions involving counterfeit money. One of the conspiracies had two participants; the other had three; and one defendant Katz, was common to each.[7] "The true inquiry," said the Court, "is not whether there has been a variance of proof,

[6] The court carefully examined the evidence relating to petitioners and considered that their guilt turned upon their intent in making the misrepresentations on their applications for loan. The jury, it thought, must have believed Brown, who testified that their misrepresentations had been deliberate. The opinion stated there was some possibility that, in so far as Brown's story as to his transactions with applicants not in conspiracy with petitioners had been confirmed, "the jury might have been disposed to find more credible the story of his dealings" with petitioners; but it was held that in the circumstances of this case the possibility did not warrant reversal; since whenever two crimes are tried together the possibility of confusion exists "because testimony relevant to one crime may gain credibility from testimony relevant only to the other" and Congress has not insisted upon absolute separation.

Rev. Stat. § 1024, 18 U. S. C. § 557, provides: "When there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the court may order them to be consolidated."

The Court of Appeals in this case, as in United States v. Liss, 137 F. 2d 995; see also United States v. Cohen, 145 F. 2d 82, 89; United States v. Rosenberg, 150 F. 2d 788, 793, treated the problem of variance as "strictly speaking rather one of joinder" under § 557.

[7] The facts were succintly stated. "It is not necessary now to refer to the evidence further than to say that it tended to establish not a single conspiracy as charged, but two conspiracies—one between Rice and Katz and another between Berger, Jones and Katz. The only connecting link between the two was that Katz was in both conspiracies and the same counterfeit money had to do with both. There was no evidence that Berger was a party to the conspiracy between Rice and Katz." 295 U. S. at 80. For a more complete statement of the facts see the opinion of the Circuit Court of Appeals in the same case, 73 F. 2d 278. In that opinion the court said: "The materiality of a variance does not depend upon the degree of its logical perversity but upon how far it throws confusion into the trial and makes it likely to miscarry." 73 F. 2d at 280.

but whether there has been such a variance as to 'affect the substantial rights' of the accused." 295 U. S. at 82.

The Court held the variance not fatal,[8] resting its ruling on what has become known as "the harmless error statute," § 269 of the Judicial Code, as amended (28 U. S. C. § 391), which is controlling in this case and provides:

> On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects or exceptions which do not affect the substantial rights of the parties.[9]

Applying that section, the Court likened the situation to one where the four persons implicated in the two conspiracies had been charged as conspirators in separate counts, but with a failure in the proof to connect one of them (Berger) with one of the conspiracies, and a resulting conviction under one count and acquittal under the other. In that event, the Court said, "Plainly enough, his substantial rights would not have been affected." The situation supposed and the one actually presented, the opinion stated, though differing greatly in form, were not different in substance. The proof relating to the conspiracy with which Berger had not been connected could be regarded as incompetent as to him. But nothing in the facts, it was concluded, could reasonably be said to show that prejudice or surprise resulted; and the court went

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[8] But the Court applied § 269 in another connection to reverse the conviction, namely, for misconduct of the prosecuting attorney in examination of witnesses and in addressing the jury.

This Court has explicitly considered or applied § 269 in connection with the following criminal cases: Horning v. District of Columbia, 254 U. S. 135; Sinclair v. United States, 279 U. S. 749 (contempt); Aldridge v. United States, 283 U. S. 308, dissenting opinion; Berger v. United States, 295 U. S. 78; Bruno v. United States, 308 U. S. 287; United States v. Socony-Vacuum Oil Co., 310 U. S. 150; Weiler v. United States, 323 U. S. 606; Bollenbach v. United States, 326 U. S. —.

[9] Both the Federal Rules of Civil Procedure, 28 U. S. C. following § 723(c), Rule 61, and the Federal Rules of Criminal Procedure, effective March 21, 1946, Rule 52(a), contain "harmless error" sections. With respect to the latter it is said, "This rule is a restatement of existing law . . . ." with citation of 28 U. S. C. § 391 and 18 U. S. C. § 556. Notes to the Rules of Criminal Procedure for the District Courts of the United States, as prepared under the direction of the Advisory Committee on Rules of Criminal Procedure (1945) 43. See also Preliminary Draft of the Federal Rules of Criminal Procedure (1943) 307; Second Preliminary Draft of the Federal Rules of Criminal Procedure (1944) 185.

on to say, "Certainly the fact that the proof disclosed two conspiracies instead of one, each within the words of the indictment, cannot prejudice his defense of former acquittal of the one or former conviction of the other, if he should again be prosecuted." 295 U. S. at 83.

The question we have to determine is whether the same ruling may be extended to a situation in which one conspiracy only is charged and at least eight having separate, though similar objects, are made out by the evidence, if believed; and in which the more numerous participants in the different schemes were, on the whole, except for one, different persons who did not know or have anything to do with one another.

The salutary policy embodied in § 269 was adopted by the Congress in 1919 (Act of February 26, 1919, c. 48, 40 Stat. 1181) after long agitation under distinguished professional sponsorship,[10] and after thorough consideration of various proposals designed to enact the policy in successive Congresses from the Sixtieth to the Sixty-fifth.[11] It is not necessary to review in detail the history of the abuses which led to the agitation or of the progress of the legislation through the various sessions to final enactment without debate. 56 Cong. Rec. 11586; 57 Cong. Rec. 3605. But anyone familiar with it knows that § 269 and similar state legislation[12] grew out of widespread and deep conviction over the general course of appellate review in American criminal causes. This was shortly, as one trial judge put it after § 269 had become law, that courts of review, "tower above the trials of criminal cases as impregnable citadels of technicality."[13]

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[10] See Pound, The Causes of Popular Dissatisfaction with the Administration of Justice, 29 A. B. A. Rep., Pt. 1, 395; 29 *id.* Pt. 2, 11, 55; 31 *id.* 505; 33 *id.* 27, 542; 34 *id.* 61, 578; 35 *id.* 56, 614; 36 *id.* 448; 37 *id.* 42, 557; 38 *id.* 44, 547; 39 *id.* 31, 575; 41 *id.* 36, 540; 2 A. B. A. J. 603; 42 A. B. A. Rep. 40, 334; 3 A. B. A. J. 507; 44 A. B. A. Rep. 62; 5 A. B. A. J. 455.

[11] See, e. g., Hearings before the Committee on the Judiciary, H. R., on American Bar Association Bills, 62d Cong., 2d Sess.; H. R. Rep. No. 1948, 61st Cong., 3d Sess.; H. R. Rep. No. 611, 62d Cong., 2d Sess.; Sen. Rep. No. 1066, 62d Cong., 2d Sess.; 48 Cong. Rec. 11770-11777; H. R. Rep. No. 1210, 63d Cong., 3d Sess.; Sen. Rep. No. 853, 63d Cong., 3d Sess.; H. R. Rep. No. 264, 64th Cong., 1st Sess.; H. R. Rep. No. 913, 65th Cong., 3d Sess.; 57 Cong. Rec. 11586; 57 Cong. Rec. 3605.

[12] As of 1927 some eighteen states had adopted statutes similar to [illegible]. Sunderland, The Problem of Appellate Review (1927) 5 Tex. L. Rev. 14[illegible]. See also the list of statutes in the Official Draft of the American Law Institute Code of Criminal Procedure (1930) 1302-1304.

[13] Kavanagh, Improvement of Administration of Criminal Justice by Exercise of Judicial Power (1925) 11 A. B. A. J. 217, 222.

So great was the threat of reversal, in many jurisdictions, that criminal trial became a game for sowing reversible error in the record, only to have repeated the same matching of wits when a new trial had been thus obtained.

In the broad attack on this system great legal names were mobilized, among them Taft, Wigmore, Pound and Hadley, to mention only four.[14] The general object was simple, to substitute judgment for automatic application of rules; to preserve review as a check upon arbitrary action and essential unfairness in trials, but at the same time to make the process perform that function without giving men fairly convicted the multiplicity of loopholes which any highly rigid and minutely detailed scheme of errors, especially in relation to procedure, will engender and reflect in a printed record.

The task was too big, too various in detail, for particularized treatment. Cf. *Bruno* v. *United States*, 308 U. S. 287, 293. The effort at revision therefore took the form of the essentially simple command of § 269. It comes down on its face to a very plain admonition: "Do not be technical, where technicality does not really hurt the party whose rights in the trial and in its outcome the technicality affects." It is also important to note that the purpose of the bill in its final form was stated authoritatively to be "to cast upon the party seeking a new trial the burden of showing that any technical errors that he may complain of have affected his substantial rights, otherwise they are to be disregarded." H. R. Rep. No. 913, 65th Cong., 3d Sess., 1. But that this burden does not extend to all errors appears from the statement which follows immediately. "The proposed legislation affects only technical errors. If the error is of such a character that its natural effect is to prejudice a litigant's substantial rights, the burden of sustaining a verdict will, notwithstanding this legislation, rest upon the one who claims under it." *Ibid.*

[14] See Hadley, Criminal Justice in America (1925) 61 A. B. A. J. 674; Hadley, Outline of Code of Criminal Procedure (1926) 12 A. B. A. J. 690; Taft, Administration of Criminal Law, in Present Day Problems, A Collection of Addresses (1908) 333; and cf. Hicks, William Howard Taft (1945) 68, 69; Wigmore, Criminal Procedure—"Good" Reversals and "Bad" Reversals (1909) 4 Ill. Rev. 352; Wigmore, Evidence (1904) § 21.

Perhaps the most notable instance of hypertechnicality in a court's assignment of a reason for its decision, arising in the early part of the period of agitation, is to be found in *State* v. *Campbell*, 210 Mo. 263. See also *State* v. *Warner*, 220 Mo. 23. The ruling was reversed in *State* v. *Atkinson*, 284 Mo. 680, 695.

Bruno v. *United States, supra,* at 294; *Weiler* v. *United States,* 323 U. S. 606, 611.

Easier was the command to make than it has been always to observe. This, in part because it is general; but in part also because the discrimination it requires is one of judgment transcending confinement by formula or precise rule. *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 240. That faculty cannot ever be wholly imprisoned in words, much less upon such a criterion as what are only technical, what substantial rights; and what really affects the latter hurtfully. Judgment, the play of impression and conviction along with intelligence, varies with judges and also with circumstance. What may be technical for one is substantial for another; what minor and unimportant in one setting crucial in another.

Moreover, lawyers know, if others do not, that what may seem technical may embody a great tradition of justice, *Weiler* v. *United States, supra,* or a necessity for drawing lines somewhere between great areas of law; that, in other words, one cannot always segregate the technique from the substance or the form from the reality. It is of course highly technical to confer full legal stautus upon one who has just attained his majority, but deny it to another a day, a week or a month younger. Yet that narrow line, and many others like it, must be drawn. The "hearsay" rule is often grossly artificial. Again in a different context it may be the very essence of justice, keeping out gossip, rumor, unfounded report, second-, third-, or further hand stories.

All this hardly needs to be said again. But it must be comprehended and administered every day. The task is not simple, although the admonition is. Neither is it impossible. By its very nature no standard of perfection can be attained. But one of fair approximation can be achieved. Essentially the matter is one for experience to work out. For, as with all lines which must be drawn between positive and negative fields of law, the precise border may be indistinct, but case by case determination of particular points adds up in time to discernible direction.

In the final analysis judgment in each case must be influenced by conviction resulting from examination of the proceedings in their entirety, tempered but not governed in any rigid sense of *stare decisis* by what has been done in similar situations. Cf. *United States* v. *Socony-Vacuum Oil Co., supra,* at 240-242. Neces-

sarily the character of the proceeding, what is at stake upon its outcome, and the relation of the error asserted to casting the balance for decision on the case as a whole, are material factors in judgment.

The statute in terms makes no distinction between civil and criminal causes. But this does not mean that the same criteria shall always be applied regardless of this difference. Indeed the legislative history shows that the proposed legislation went through many revisions, largely at the instance of the Senate,[15] because there was fear of too easy relaxation of historic securities thrown around the citizen charged with crime. Although the final form of the legislation was designed, and frequently has been effective,[16] to avoid some of the absurdities by which skilful manipulation of procedural rules had enabled the guilty to escape just punishment, § 269 did not make irrelevant the fact that a person is on trial for his life or his liberty. It did not require the same judgment in such a case as in one involving only some question of civil liability. There was no purpose, for instance, to abolish the historic difference between civil and criminal causes relating to the burden of proof placed in the one upon the plaintiff and in the other on the prosecution. Nor does § 269 mean that an error in receiving or excluding evidence has identical effects, for purposes of applying its policy, regardless of whether the evidence in other respects is evenly balanced or one-sided. Errors of this sort in criminal causes conceivably may be altogether harmless in the face of other clear evidence, although the same error might turn scales otherwise level, as constantly appears in the application of the policy of § 269 to questions of the admission of cumulative evidence.[17] So it is with errors in instructions to the jury. Cf. *United States* v. *Socony-Vacuum Oil Co.*, *supra*, at 239, 241.

[15] See the materials cited in notes 10 and 11. At one time the Senate Judiciary Committee recommended that the "harmless error" bill be confined solely to civil cases. S. Rep. No. 1066, 62d Cong., 2d Sess. See 38 A. B. A. Rep. 546-548. At another time the same committee reported out a bill considerably weaker than that passed in the House of Representatives. See 53 Cong. Rec. 2493; 41 A. B. A. Rep. 540; 2 A. B. A. J. 602. See also 42 A. B. A. Rep. 334; 3 A. B. A. J. 507.

[16] Cf. Horning v. District of Columbia, 254 U. S. 135; Snciršon v. United States, 264 Fed. 268, 275-277, and see other authorities cited in United States v. Antonelli Fireworks Co., — F. 2d —, dissenting opinion, notes 12 and 12a. See also 18 U. S. C. § 556.

[17] E. g., Lucks v. United States, 100 F. 2d 908; United States v. Goldsmith, 91 F. 2d 983, 986; Beach v. United States, 19 F. 2d 739, 743.

Some aids to right judgment may be stated more safely in negative than in affirmative form. Thus, it is not the appellate court's function to determine guilt or innocence. *Weiler* v. *United States, supra,* at 611; *Bollenbach* v. *United States,* 326 U. S. — (slip opinion, pp. 5, 6). Nor is it to speculate upon probable reconviction and decide according to how the speculation comes out. Appellate judges cannot escape such impressions. But they may not make them sole criteria for reversal or affirmance. Those judgments are exclusively for the jury, given always the necessary minimum evidence legally sufficient to sustain the conviction unaffected by the error.[18] *Weiler* v. *United States, supra; Bollenbach* v. *United States, supra.*

But this does not mean that the appellate court can escape altogether taking account of the outcome. To weigh the error's effect against the entire setting of the record without relation to the verdict or judgment would be almost to work in a vacuum. Cf. *United States* v. *Socony-Vacuum Oil Co., supra,* at 239, 242. In criminal causes that outcome is conviction. This is different, or may be, from guilt in fact. It is guilt in law, established by the judgment of laymen. And the question is, not were they right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting. Cf. *United States* v. *Socony-Vacuum Oil Co., supra,* at 239, 242; *Bollenbach* v. *United States, supra* (slip opinion, p. 6).

This must take account of what the error meant to them, not singled out and standing alone, but in relation to all else that happened. And one must judge others' reactions not by his own, but with allowance for how others might react and not be regarded generally as acting without reason. This is the important difference, but one easy to ignore when the sense of guilt comes strongly from the record.

If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the

[18] This of course presents a question of law. And when the error relates to that minimum so that, if eliminated, the proof would not be sufficient, necessarily the prejudice is substantial. Cf. Tot v. United States, 319 U. S. 463.

verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm[19] or a specific command of Congress. *Bruno* v. *United States*, *supra*, at 294. But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.

Discussion, some of it recent,[20] has undertaken to formulate the problem in terms of presumptions. In view of the statement quoted above from the House Committee's report, it would seem that any attempt to create a generalized presumption to apply in all cases would be contrary not only to the spirit of § 269 but also to the expressed intent of its legislative sponsors. Indeed, according to their explicit statement, whether the burden of establishing that the error affected substantial rights or, conversely, the burden of sustaining the verdict shall be imposed, turns on whether the error is "technical" or is such that "its natural effect is to prejudice a litigant's substantial rights." Indeed the statement, in entire accord with the letter and spirit of § 269, is an injunction against attempting to generalize broadly, by presumption or otherwise. The only permissible presumption would seem to be particular, arising from the nature of the error and "its natural effect" for or against prejudice in the particular setting.

It follows that the *Berger* case is not controlling of this one, notwithstanding that, abstractly considered, the errors in variance and instructions[21] were identical in character. The *Berger* opinion

[19] Thus, when forced confessions have been received, reversals have followed although on other evidence guilt might be taken to be clear. See Malinski v. New York, 324 U. S. 401, 404; Lyons v. Oklahoma, 322 U. S. 596, 597, n. 1; Bram v. United States, 168 U. S. 531, 540-542; United States v. Mitchell, 137 F. 2d 1006, dissenting opinion at 1012.

[20] Cf. United States v. Antonelli Fireworks Co., — F. 2d — (C. C. A. 2, No. 20087, decided May 2, 1946), majority and dissenting opinions.

[21] Although not noted in the *Berger* opinion, the instructions in that case were substantially identical with the charge given here, quoted below, to the effect that only a single conspiracy had been charged and therefore more could not be proved. The Court said: " . . . One may have control of a large amount of counterfeit money, and there may be an agreement that that

indeed expressly declared: "We do not mean to say that a variance such as that here dealt with might not be material in a different case. We simply hold, following the view of the court below, that applying § 269 of the Judicial Code, as amended, to the circumstances of this case the variance was not prejudicial and hence not fatal." 295 U. S. at 83.

On the face of things it is one thing to hold harmless the admission of evidence which took place in the *Berger* case, where only two conspiracies involving four persons all told were proved, and an entirely different thing to apply the same rule where, as here, only one conspiracy was charged, but eight separate ones were proved, involving at the outset thirty-two defendants. The essential difference is not overcome by the fact that the thirty-two were reduced, by severance, dismissal or pleas of guilty, to nineteen when the trial began and to thirteen by the time the cases went to the jury. The sheer difference in numbers, both of defendants and of conspiracies proven, distinguishes the situation. Obviously the burden of defense to a defendant, connected with one or a few of so many distinct transactions, is vastly different not only in preparation for trial, but also in looking out for and securing safeguard against evidence affecting other defendants, to prevent its transference as "harmless error" or by psychological effect, in spite of instructions for keeping separate transactions separate.

The Government's theory seems to be, in ultimate logical reach, that the error presented by the variance is insubstantial and harmless, if the evidence offered specifically and properly to convict each defendant would be sufficient to sustain his conviction, if submitted in a separate trial. For reasons we have stated and in view of the authorities cited, this is not and cannot be the test under § 269. But in apparent support of its view the Government argues that there was no prejudice here because the results show that the jury exercised discrimination as among the defendants whose cases were submitted to it. As it points out, the jury acquitted some, disagreed as to others, and found still others guilty. From this it concludes that the jury was not confused and, apparently, reached the same result as would have been reached on

money shall be distributed, and one may go forth and enlist the services of others in the furtherance of the common plan. *But it must be in furtherance of the common plan; there can't be three or four different plans. There must be one plan and all of them must bear their part.*" (Emphasis added.)

would be likely, if the convicted defendants had been or now should be tried separately.

One difficulty with this is that the trial court itself was confused in the charge which it gave to guide the jury in deliberation. The court instructed:

> The indictment charges but one conspiracy, and to convict each of the defendants of a conspiracy, the Government would have to prove, and you would have to find, that each of the defendants was a member of that conspiracy. You cannot divide it up. It is one conspiracy, and the question is whether or not each of the defendants or which of the defendants, are members of that conspiracy.

On its face, as the Court of Appeals said, this portion of the charge was plainly wrong in application to the proof made; and the error pervaded the entire charge, not merely the portion quoted.[22] The jury could not possibly have found, upon the evidence, that there was only one conspiracy. The trial court was of the view that one conspiracy was made out by showing that each defendant was linked to Brown in one or more transactions, and that it was possible on the evidence for the jury to conclude that all

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[22] The charge further stated in part:

"The Government contends, *and they have offered evidence to show*, that Simon Brown was *the pivot* around which *this whole conspiracy* revolved. Have they shown this to your satisfaction? If they have, then we advance another step. *What was the relation between the several defendants? Did the defendants* Michael Lekacos, Louis Levine, Gus Kotteakos, Max J. Posner, James Secular, Nathan Regenbogen, *bring applicants or applications from any of these defendants to Brown?* Were any of these men acquainted with each other? Had they obtained loans for themselves, and after they had them, had they obtained loans for somebody else?

"That is the question. You have the evidence. It is certainly not all admitted. You have heard it explained to you.

"But if that be true, that these men were getting people to come in with Brown; *then it is for you to say whether you do not find streams running through each of them to Brown, and that all of these streams led in a common direction, and they are carrying craft destined for the same place.* That is the question.

"At least one of these applications was given to somebody. I think there was one given to Brown himself, but you can remember that. In reference to the others *did they come to Brown through* the agency, or through the introduction, or through the act of solicitation of these applications by *any* of the men that I have mentioned?

"That is important. *It is important because the allegation is a conspiracy, and there must be a common purpose shown. Was that a common purpose that was intended to be accomplished, and was the conspiracy* to do these things, to violate the law and to perpetrate a fraud against the Government, *participated in by any or all* of these defendants *and did they bring others or any of the others, to Brown?* That is the question." (Emphasis added.)

were in a common adventure because of this fact and the similarity of purpose presented in the various applications for loans.[23]

This view, specifically embodied throughout the instructions, obviously confuses the common purpose of a single enterprise with the several, though similar, purposes of numerous separate adventures of like character. It may be that, notwithstanding the misdirection, the jury actually understood correctly the purport of the evidence, as the Government now concedes it to have been, and came to the conclusion that the petitioners were guilty only of the separate conspiracies in which the proof shows they respectively participated. But, in the face of the misdirection and in the circumstances of this case, we cannot assume that the lay triers of fact were so well informed upon the law or that they disregarded the permission expressly given to ignore that vital difference. *Bollenbach* v. *United States*, *supra* (slip opinion p. 5).

As we have said, the error permeated the entire charge, indeed the entire trial. Not only did it permit the jury to find each defendant guilty of conspiring with thirty-five[24] other potential co-conspirators, or any less number as the proof might turn out for acquittal of some, when none of the evidence would support such a conviction, as the proof did turn out in fact. It had other effects. One was to prevent the court from giving a precautionary instruction such as would be appropriate, perhaps required, in cases where related but separate conspiracies are tried together under § 557 of the Code,[25] namely, that the jury should take care to consider the evidence relating to each conspiracy separately from that relating to each other conspiracy charged.[26] The court here was careful to caution the jury to consider each defendant's case separately, in determining his participation in "the scheme" charged. But this obviously does not, and could not, go to keeping distinct conspiracies distinct, in view of the court's conception of the case.

Moreover, the effect of the court's misconception extended also to the proof of overt acts. Carrying forward his premise that the jury could find one conspiracy on the evidence, the trial judge

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[23] See note 22.

[24] In addition to the thirty-two persons who were indicted, four were named in the indictment as co-conspirators. See note 1.

[25] See note 6; also text at note 30.

[26] See United States v. Liss, 137 F. 2d 995, dissenting opinion, at 1002-1003; cf. Telman v. United States, 67 F. 2d 716, 718.

further charged that, if the jury found a conspiracy, "then the acts or the statements of *any* of those whom you so find to be conspirators between the two dates that I have mentioned, may be considered by you in evidence as against *all* of the defendants whom you so find to be members of *the* conspiracy." (Emphasis added.) The instructions in this phase also declared:

> It is not necessary, as a matter of law, that an overt act be charged against each defendant. It is sufficient if the conspiracy be established and the defendant be found to be a member of the conspiracy—it is sufficient to allege overt acts on the part of any others who may have been members of the conspiracy, if those acts were done in furtherance of, and for the purpose of accomplishing the conspiracy.[27]

On those instructions it was competent not only for the jury to find that all of the defendants were parties to a single common plan, design and scheme, where none was shown by the proof, but also for them to impute to each defendant the acts and statements of the others without reference to whether they related to one of the schemes proven or another, and to find an overt act affecting all in conduct which admittedly could only have affected some. True, the Court of Appeals painstakingly examined the evidence directly relating to each petitioner and concluded he had not been prejudiced in this manner.[28] That judgment was founded largely in the fact that each was clearly shown to have shared in the fraudulent phase of the conspiracy in which he participated. Even so, we do not understand how it can be concluded, in the face of the instruction, that the jury considered and was influenced by nothing else.

All this the Government seeks to justify as harmless error. Again the basis is that because the proof was sufficient to establish the participation of each petitioner in one or more of several smaller conspiracies, none of them could have been prejudiced because all were found guilty, upon such proof, of being mem-

[27] A similar instruction was given in the *Berger* case: "Let me say to you if a conspiracy existed then the actions or the statements or the declarations of any of the conspirators would bind all the others, if there was a conspiracy, up to the time of the arrest, and then the conspiracy ended. . . . the statements or acts of anyone who was a conspirator prior to the termination of the conspiracy by the arrest bound all the others. They are bound by that just as though they had done it and said it themselves." And further, "There were alleged here certain overt acts and the Government must prove at least one of them in order to vitalize the conspiracy."

[28] See note 6 *supra*.

bers of a single larger conspiracy of the same general character. And the court's charge, in all the phases of its application to the facts, is regarded as "no more than a misnomer" which "cannot in itself be considered prejudicial." Stress is also placed upon the fact that, because the only kind of evidence to show petitioners' "membership in a conspiracy" was evidence that they themselves "had performed acts of direct participation in a conspiracy," in its finding that they had "joined a conspiracy, the jury at that point must have credited evidence which completely established guilt." All this, it is said also, the *Berger* case sustains.

We do not agree. It is true, as we have said, that taken in abstration from the particular facts the cases are alike in these respects: The indictment charged a single conspiracy only; the proof showed more than one; the instructions told the jury erroneously that on the evidence they could find the defendants guilty of a single confederation; must find that each defendant joined it, in order to convict; must consider the evidence as to each separately on this phase; but, once satisfied concerning that, could attribute to each one found to be a member any act done by any other co-conspirator in furtherance of "the scheme" as an overt act, again in obvious error; and in neither case, of course, was there precaution to keep separate conspiracies separate. It is also true that, again abstractly taken, the indictment here might be considered, as was the one in *Berger*, *literally* to cover each of the conspiracies proved, if taken by itself. But obviously a much greater stretch of imagination is needed to regard an indictment charging thirty-six people with conspiring together as meaning that only three or four or even five did so, than was needed to say that one charging four as agreeing with each other in terms covered each of two agreements by three of the four, one conspirator being different in each proved offense. And even more would be needed to look upon the former as charging eight or more conspiracies than upon the latter as indicting for two.

These are the abstract similarities. They are only abstract. To strip them from the separate and distinct total contexts of the two cases, and disregard the vast difference in those contexts, is to violate the whole spirit, and we think the letter also, of § 269. Numbers are vitally important in trial, especially in criminal cases

ters. Guilt with us remains individual and personal, even as respects conspiracies. It is not a matter of mass application. There are times when of necessity, because of the nature and scope of the particular federation, large numbers of persons taking part must be tried together or perhaps not at all, at any rate as respects some. When many conspire, they invite mass trial by their conduct. Even so, the proceedings are exceptional to our tradition and call for use of every safeguard to individualize each defendant in his relation to the mass. Wholly different is it with those who join together with only a few, though many others may be doing the same and though some of them may line up with more than one group.

Criminal they may be, but it is not the criminality of mass conspiracy. They do not invite mass trial by their conduct. Nor does our system tolerate it. That way lies the drift toward totalitarian institutions. True, this may be inconvenient for prosecution. But our Government is not one of mere convenience or efficiency. It too has a stake, with every citizen, in his being afforded our historic individual protections, including those surrounding criminal trials. About them we dare not become careless or complacent when that fashion has become rampant over the earth.

Here toleration went too far. We do not think that either Congress, when it enacted § 269, or this Court, when deciding the *Berger* case, intended to authorize the Government to string together, for common trial, eight or more separate and distinct crimes, conspiracies related in kind though they might be, when the only nexus among them lies in the fact that one man participated in all. Leeway there must be for such cases as the *Berger* situation and for others where proof may not accord with exact specifications in indictments.[29] Otherwise criminal conspirators never could be brought to halt. But if the practice here followed

[29] *Ibid.* It is common and approved practice, in charging a conspiracy, to name all who may be reached with process and whom it is anticipated the proof will connect with the scheme, although in most instances whether it will so turn out for each defendant can be only problematical. If failure to substantiate the charge as to one or more were to change the identity of the crime charged, so as to require reindictment and retrial for the others, the law of conspiracy would be a dead letter. But this accepted practice does not comprehend or justify that attempted here. If this comes down to a difference of degree, it is still one of vital importance—as such differences always come to be when degrees spread farther and farther apart.

were to stand, we see nothing to prevent its extension to a dozen, a score, or more conspiracies and at the same time to scores of men involved, if at all, only separately in them. The dangers for transference of guilt from one to another across the line separating conspiracies, subconsciously or otherwise, are so great that no one really can say prejudice to substantial right has not taken place. Section 269 had no purpose to go so far. The line must be drawn somewhere. Whether or not *Berger* marks the limit, for this sort of error and case, we are clear that it must lie somewhere between that case and this one.

In so ruling we are not unmindful, as the Court of Appeals has held more than once,[30] that the problem is not merely one of variance between indictment and proof or of the right application of the policy of § 269 for freedom of judgment, but is also essentially one of proper joinder under § 557 of the Judicial Code. When we look at that section's requirement for separate statement in different counts of related but distinct "acts or transactions of the same class of crimes or offenses, which may be properly joined instead of having several indictments," our conclusion is reinforced.

Section 557 too is a relaxation of rules of strict regularity. When to this is added the further relaxation of § 269 for criminal causes, all technical advantage for the accused deriving not only from detailed specification of the offense in the indictment but also from separate statement of distinct offenses would seem to be lost. But this too may be carried too far. For, potentially at any rate, § 269 carries the threat of overriding the requirement of § 557 for substituting separate counts in the place of separate indictments, unless the application of § 269 is made with restraint. The two sections must be construed and applied so as to bring them into substantial harmony, not into square conflict.

We need not inquire whether the Sixth Amendment's requirement, that "in all criminal prosecutions the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation," would be observed in a more generous application of § 269 to a situation governed also by § 557 than was made in the *Berger* ruling. Nor need we now express opinion whether reversal would be required in all cases where the indictment is so

[30] See the authorities cited in note 6.

defective that it should be dismissed for such a fault, as the Court of Appeals said of the indictment in this case, taken in the trial court's conception.

We have had regard also for the fact that the Court of Appeals painstakingly examined the evidence relating directly to each of the petitioners; found it convincing to the point of making guilt manifest; could not find substantial harm or unfairness in the all-prevading error or in any particular phase of the trial; and concluded that reversal would be a miscarriage of justice.

With all deference we disagree with that conclusion and with the ruling that the permeating error did not affect "the substantial rights of the parties." That right, in each instance, was the right not to be tried *en masse* for the conglomeration of distinct and separate offenses committed by others as shown by this record.

It may be, as the Court of Appeals found, that the evidence concerning each petitioner was so clear that conviction would have been dictated and reversal forbidden, if it had been presented in separate trials for each offense or in one or more substantially similar to the *Berger* trial in the number of conspiracies and conspirators involved. But whether so or not is neither our problem nor that of the Court of Appeals for this case. That conviction would, or might probably, have resulted in a properly conducted trial is not the criterion of § 269. We think it highly probable that the error had substantial and injurious effect or influence in determining the jury's verdict.

We have not rested our decision particularly on the fact that the offense charged, and those proved, were conspiracies. That offense is perhaps not greatly different from others when the scheme charged is tight and the number involved small. But as it is broadened to include more and more, in varying degrees of attachment to the confederation, the possibilities for miscarriage of justice to particular individuals become greater and greater. Cf. *Gebardi* v. *United States*, 287 U. S. 112, 122 n. 7, citing Report of the Attorney General (1925) 5-6, setting out the recommendations of the Conference of Senior Circuit Judges with respect to conspiracy prosecutions. At the outskirts they are perhaps higher than in any other form of criminal trial our system affords. The greater looseness generally allowed for specifying the offense and

its details, for receiving proof, and generally in the conduct of the trial, becomes magnified as the numbers involved increase. Here, if anywhere, cf. *Bollenbach* v. *United States, supra,* extraordinary precaution is required, not only that instructions shall not mislead, but that they shall scrupulously safeguard each defendant individually, as far as possible, from loss of identity in the mass. Indeed, the instructions often become, in such cases, his principal protection against unwarranted imputation of guilt from others' conduct. Here also it is of special importance that plain error be not too readily taken to be harmless.

Accordingly the judgments are reversed and the causes are remanded for further proceedings in conformity with this opinion.

Reversed.

Mr. Justice BLACK concurs in the result.

Mr. Justice JACKSON took no part in the consideration or decision of these cases.

SUPREME COURT OF THE UNITED STATES.

No. 457 and 458.—October Term, 1945.

Gus Kotteakos, and Michael Lekacos, Petitioners,
457 *vs.*
The United States.

Nathan Regenbogen, Petitioner,
458 *vs.*
The United States.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[June 10, 1946.]

Mr. Justice Douglas, with whom Mr. Justice Reed agrees, dissenting.

It is clear that there was error in the charge. An examination of the record in *Berger* v. *United States*, 295 U. S. 78, shows that the same erroneous instructions were in fact given in that case. But I do not think the error "substantially injured" (*id.*, p. 81) the defendants in this case any more than it did in the *Berger* case.

Whether injury results from the joinder of several conspiracies depends on the special circumstances of each case. Situations can easily be imagined where confusion on the part of the jury is likely by reason of the sheer number of conspirators and the complexities of the facts which spell out the series of conspiracies. The evidence relating to one defendant may be used to convict another.

Those possibilities seem to be non-existent here. Nothing in the testimony of the other defendants even remotely implicated petitioners in the other frauds. Nothing in the evidence connected petitioners with the other defendants, except Brown, in the slightest way. On the record no implication of guilt by reason of a mass trial can be found. The dangers which petitioners conjure up are abstract ones.

Moreover, the true picture of the case is not thirty-two defendants engaging in eight or more different conspiracies which were lumped together as one. The jury convicted only four persons

in addition to petitioners.[1] The other defendants and the evidence concerning them were in effect eliminated from the case. We have then a case of two closely related conspiracies involving petitioners and two additional conspiracies in which petitioners played no part—but all of the same character and revolving around the same central figure, Brown. If, then, we look at what actually transpired before the jury rather than at what the indictment charged, we have a case approaching in its simplicity the *Berger* case. And the strong and irresistible inference that the jury was not confused is bolstered by their failure to convict six of the thirteen defendants on trial before them.

As I have said, it is plain that there was error in the charge as to the conspiracy. But I agree with Judge Learned Hand, speaking for the court below, when he said (151 F. (2d) p. 174):

> "There remains only the question of the court's error in directing the jury that they must find that there was one conspiracy, or that they should acquit all. That was of course an error, as we have said, but it favored the accused. To suppose that these appellants suffered from it we should have to say that, if the judge had told the jury that they could convict any of the three for conspiring with Brown alone, they might have acquitted one or more of them, in spite of the fact that they convicted them all of a conspiracy with Brown and the other applicants. That is incredible; indeed it is nonsense. Brown being the only liaison between the appellants and the other applicants, the jury could not rationally have drawn the appellants into the net with all the others, unless they had believed that the appellants and Brown had conspired together. The rest was surplusage which may be disregarded."

The trial judge did improperly charge the jury not only that there was one conspiracy but also that the overt acts of any one conspirator were binding on all. But only if we consider the question in the abstract would we hold that was reversible error. For the charge made clear that before the jury could impute the acts of one conspirator to another, they were required

[1] Before trial a severance was granted on motion of the prosecutor as to four defendants. The indictment was nol-prossed as to one. Eight pleaded guilty before trial. Nineteen were brought to trial. One pleaded guilty during the trial and a nolle prosequi was entered as to another. The case was severed as to another who became ill during the trial. Verdicts of acquittal were directed as to three. Of the thirteen whose cases were submitted to the jury, two were acquitted. The jury disagreed as to four. The remaining seven, including petitioners, were convicted.

to find that the particular defendant had first joined the conspiracy. The evidence shows that each of petitioners, acting through Brown, had made a fraudulent application for a loan. When the jury found that each of the petitioners had entered into a conspiracy with Brown, it made a complete determination of guilt as to that petitioner. The error in the other parts of the charge therefore did not reach the essential factors by which guilt or innocence must be determined. The situation would be different if membership in the conspiracy were shown by slight evidence of knowledge and association and the acts of others would need be imputed to a defendant in order to establish guilt beyond a reasonable doubt. And I would agree that reversible error would be established if the record left a lingering doubt on that score. But in view of the clear proof implicating petitioners, the simplicity of the transactions, and the fact that the jury must have credited evidence which completely established guilt in order to find that petitioners joined the conspiracy, I cannot believe the erroneous charge was prejudicial.

There are, of course, further possibilities of prejudice. As stated in the *Berger* case, *supra*, p. 82, "The general rule that allegations and proof must correspond is based upon the obvious requirements (1) that the accused shall be definitely informed as to the charges against him, so that he may be enabled to present his defense and not be taken by surprise by the evidence offered at the trial; and (2) that he may be protected against another prosecution for the same offense." But no surprise is shown. The overt acts charged in the indictment against petitioners were those implicating them in the conspiracy in which each participated. All of the overt acts charged were established by the evidence. And it would seem evident on the face of the indictment that petitioners would know that they must be prepared to defend against proof that they conspired with at least one of the other defendants. It is difficult to see how petitioners would be more misled here than if a single conspiracy had been charged but some of the defendants were not shown to be connected with it. And it is clear that petitioners were adequately protected against a second prosecution. The indictment and the evidence are available to disclose the proof on which the convictions rested. Parole evidence is likewise available to show the

subject matter of the former conviction. *Bartell* v. *United States*, 227 U. S. 427, 433.

The several conspiracies could have been joined as separate counts in one indictment. For they were plainly "acts or transactions of the same class of crimes or offenses" within the meaning of 18 U. S. C. § 557. The objection that they were not so joined but were lumped together as one conspiracy is purely formal, as the Circuit Court of Appeals said, where, as here, it appears that there was no prejudice.